UNITED STATES SUPREME COURT.

OCTOBER TERM, 1905.

No. 393.

THE COMMONWEALTH OF KENTUCKY, ...*Appellant*,

vs.

CALEB POWERS ....*Appellee*

BRIEF FOR CALEB POWERS AS TO THE SECOND PARAGRAPH OF PETITION.

May it Please the Court:

This cause is pending in this Court upon an appeal prosecuted by the Commonwealth of Kentucky from a decision and judgment rendered July 7, 1905, by the United States Circuit Court of the Sixth Circuit for the Eastern District of Kentucky, Judge Andrew J. Cochran presiding, holding that a certain criminal prosecution entitled The Commonwealth of Kentucky *vs.* Caleb Powers, had been properly removed for trial into the United States Circuit Court for the Eastern District of Kentucky, under Section 641 of the Revised Statutes of the United States, and that a writ of *habeas corpus cum causa* should issue under Section 642.

This brief will refer only to the second paragraph of Caleb Powers' petition for removal. Other counsel will prepare briefs discussing the first paragraph, and other branches of this controversy including Caleb Powers' motion to dismiss the appeal.

The first paragraph sets up as a ground for removal, a pardon issued to Powers by W. S. Taylor, Governor of Kentucky, and contends that Taylor was recognized as Governor by the executive power of the United States, and that accordingly Powers was denied his equal civil rights when this pardon was ignored by all the Courts of Kentucky.

THE JURY QUESTION.

The second paragraph sets up as grounds for removal, various discriminations in selection of jurors—which discriminations were not confined to sheriffs and jury commissioners and other jury officers, but were made the action of the judicial tribunals of the State; first by rulings and decisions of lower or trial Courts, upholding such discriminations as being no *denial of equal civil rights;* and, second, by the decisions of the high Court of last resort in Kentucky *declining to pass* upon the discriminations complained of—these appellate decisions having the effect of rendering the accused, Caleb Powers, *unable to enforce* his equal civil rights in the judicial tribunals of the state.

It is this second paragraph—the discrimination proposition—the jury proposition—which it is proposed to discuss in this particular brief.

This brief will follow very closely the reasoning in the decision of Circuit Judge Cochran.

PRIOR PROCEEDINGS.

In his written opinion in the United States Circuit Court, Judge Cochran has thus correctly summarized the proceedings up to the time of the hearing before him:

The First Trial.

March 9, 1900, said prosecution was begun by the issuance of a warrant for defendant's arrest by the County Judge of Franklin county. March 11, 1900, defendant was arrested under said warrant. March 27, 1900, after an examining trial, had before said County Judge, he was held without bail to the grand jury of said county at the then next April term of the Circuit Court thereof. April 17, 1900, an indictment found by said grand jury was returned into court. May 20, 1900, the prosecution was transferred to the Circuit Court of Scott county, an adjoining county to Franklin, and in the same judicial district, and within said Eastern District of Kentucky, on defendant's motion for a change of venue.

Beginning July 9, a special term of the said Scott Circuit Court was held, at which defendant was tried and found guilty by the jury, who fixed his punishment at imprisonment for life. The verdict was returned August 18, 1900, and judgment therein was entered September 5, 1900. The jurors from whom said jury was impaneled came from Scott county, and said jury was composed entirely of Scott county jurors. March 28, 1901, the Court of Appeals of Kentucky reversed this judgment, the Court standing four to three in favor of the reversal, and remanded the prosecution to the lower court for further proceedings consistent with the opinion then delivered. The grounds of reversal were errors of the lower court as to the admissibility of testimony and instructions to the jury.

THE SECOND TRIAL.

October 10, 1901, at the regular October term, 1901, of said court, a second trial of defendant was had which terminated as the first trial. The verdict of the jury was returned October 26, 1901, and judgment therein was entered the same day. The jurors from whom this jury was impaneled came partially from Scott county and partially from Bourbon county, an adjoining county to Scott, and in the same State judicial district, and said jury seems to have been composed of six jurors from Scott and six from Bourbon. December 3, 1902, the Court of Appeals reversed this judgment, the Court standing four to three in favor of reversal, and remanded the prosecution to the lower Court for proceedings consistent with the opinion then delivered. The grounds of reversal were the same as on the first appeal and, in addition, the refusal of the judge of the lower court to vacate at the second trial therein, upon defendant's filing an affidavit under Section 968 of the Kentucky Statutes, to the effect that said judge would not give him a fair and impartial trial and setting forth at large the facts upon which he based this claim. On the filing of the mandate of the Court of Appeals in the lower court, said judge refused to vacate the bench and thereafter was required to do so by a writ of prohibition from the Appellate Court. Thereupon a special judge was appointed by the Governor to try the case at the next trial.

THE THIRD TRIAL.

Beginning August 3, 1903, a special term of the Scott Circuit Court was held, at which defendant was again tried and found guilty, but this time the jury fixed his punishment at death instead of imprisonment for life, as had been done by the two former juries. The verdict

was returned August 29, 1903, and judgment thereon was entered the same day. The jurors from whom this jury was impaneled came from Bourbon county, and said jury was composed entirely of Bourbon county jurors. December 6, 1904, the Court of Appeals reversed this judgment, the Court standing four to three in favor of reversal, and remanded the prosecution to the lower court for proceedings consistent with the opinion then delivered. The grounds of reversal were the entering of the judgment upon the verdict of the jury the same day it was returned, in violation of a code provision, when defendant was seeking more time for filing additional grounds for new trial and improper conduct on the part of one of the counsel employed for the Commonwealth in his argument to the jury. Theretofore a jury in the Franklin Circuit Court had convicted James B. Howard, claimed to be the assassin of William Goebel, of his murder, and fixed his punishment at imprisonment for life. Said counsel, in his argument to the jury, made this statement in regard to the verdict, to-wit:

"Howard was not hung, but eleven of the twelve jurors who tried him were in favor of hanging him, and one was for life imprisonment, and the eleven had to come to the one," which the lower court permitted to be made against the defendant's objections. The opinion delivered in the Court of Appeals on three separate hearings therein, may be found reported as follows, to-wit: Powers vs. Com., 110 Ky., 386; same vs. same, 114 Ky., 237; same vs. same, 83 S. W., 146.

Preparation for the Fourth Trial.

The term of office of one of the judges of the Court of Appeals, who concurred in the said judgments of reversal expired on the first day of January last, and he was succeeded by the judge of the Scott Circuit Court,

who presided at the first two trials, having been elected to said position at the regular November election in 1904. Upon his vacating the office of Circuit Judge, an appointment was made by the Governor to fill the vacancy until the November election in this year. May 3, 1905, the third day of the May term, 1905, of said Scott Circuit Court, the mandate of the Court of Appeals issued upon its last judgment of reversal, was filed in the Scott Circuit Court, and the prosecution was set for a fourth trial at a special term to begin the 10th of this month, three days hence, when a trial will be had in said court before the judge appointed to fill said vacancy, if jurisdiction of the prosecution remains in the State Court.

THE MOTION TO REMOVE.

The proceedings had under Section 641 of the Revised Statutes of the United States were begun in the Scott Circuit Court May 3, 1905, immediately upon the filing of the mandate of the Court of Appeals as hereinbefore stated. At that time defendant tendered to said court a petition for the removal of the prosecution from that court to this court, and moved that he be permitted to file the same. Upon the objection of the Commonwealth, said court refused to permit said petition to be filed. The next Circuit Court of the United States in this district held thereafter was the London term, which began May 8, 1905, five days after the tendering of the petition for removal to the State Court. On that day, upon defendant's motion, a partial transcript of the record of the State Court—all that the clerk thereof was able to furnish in the meantime—was filed, and the cause was docketed in said court. The Commonwealth objected to this action of the court and upon its being had moved to set it aside, which motion was overruled. Leave was granted to the defendant until the 8th day of June there-

after to procure and file an additional transcript, which has been done within the time limited. The motion for the writ of *habeas corpus* was made at the time of filing the partial transcript and docketing the cause, and after the filing thereof, to-wit, on June 8, said motion was taken up, argued and submitted.

THE REMOVAL STATUTES.

The statute under which said proceedings were had is Section 641, U. S. Rev. Stat. This statute originated in Section 3 of the original Civil Rights Act of April 9, 1886, was re-enacted in Section 18 of the act of May 31, 1870, re-enacting said Civil Rights Act, atfer the adoption of the Fourteenth Amendment, July 21, 1868, and was carried from thence into revision of 1873-1874 as Section 641 thereof. By Section 5 of the Jurisdictional acts of March 3, 1887, and August 13, 1888, it was provided that nothing in said acts should be held, deemed or construed to repeal or affect any jurisdiction or right mentioned in said Section 641, Section 642 providing for the issuance of the writ of *habeas corpus cum causa* sought herein, Section 643 providing for removal of civil suits and criminal prosecutions against a person indicted for acts committed while acting as a federal officer, and other statutes not necessary to be referrd to here.

That portion of Section 641 material to quote is as follows:

> "When any civil suit or criminal prosecution is commenced in any State Court for any cause whatever against any person who is denied or can not enforce in the judicial tribunals of the State or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the

United States, or of all persons within the jurisdiction of the United States * * * such suit or prosecution may, upon the petition of such defendant filed in said state court at any time before the trial, or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the state courts shall cease and shall not be resumed except as hereinafter provided.",

The remaining portion of the section provides for filing the transcript of the record in the state court in the Circuit Court of the United States and for docketing the cause therein.

Section 642 is as follows:

"When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said state court, it shall be the duty of the clerk of said circuit court to issue a writ of *habeas corpus cum causa*, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said circuit court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file and deliver to the clerk of said state court a duplicate copy of said writ."

CONSTITUTIONALITY.

These sections are peculiar in that they provide that a state prosecution for a state offense pending in a state may be removed for trial into a Federal Court and there tried. Owing to this peculiarity, they have been vigor-

ously attacked, on the ground that they were an invasion of the sphere of State action, there being, as was claimed, ntohing in the Federal Constitution to warrant them.

Section 641 was held to be constitutional March 1, 1880.

Strauder vs. W. Va., 100 U. S., 303.

See also

Virginia vs. Rives, 100 U. S., 313.
Neal vs. Delaware, 103 U. S., 370.
Bush vs. entucky, 107 U. S., 110.
Gibson vs. Miss., 162 U. S., 565.
Smith vs. Miss., 162 U. S., 592.
Murray vs. La., 163 U. S., 101.
Wilnams vs. Miss., 107 U. S., 213.

In the case of *ex parte* Virginia, Justice Field, in referring to the criminal prosecution of a State officer in a Federal Court under Section 18 of the Act of March 1, 1875, said:

> "The proceeding is a gross offense to the State, it is an attack upon her sovereignty in matter over which she has never surrendered her jurisdiction. The doctrine which sustains it, carried to its logical results, would degrade and sink her to the level of a local municipal corporation."

In the case of Tennessee vs. Davis, Justice Clifford said:

> "Viewed in any light, the proposition to remove a State indictment for felony from a State Court having jurisdiction of the case into the Circuit Court, where it is substantially admitted that the prisoner can not be tried until Congress shall enact some mode of procedure, aproaches so near to what seems to

me both absurd and ridiculous, that I fear I shall never be able to comprehend the practical wisdom which it doubtless contains."

Justice Field, in Virginia vs. Rives, said:

"There are many other difficulties in maintaining the position of the Circuit Court which the counsel for the accused and the Attorney General have earnestly defended. If a criminal prosecution of an offender against the laws of a State can be transferred to a Federal Court, what officer is to prosecute his case? Is the Attorney General of the Commonwealth to follow his case from his county, or will the United States District Attorney take charge of it? Who is to summon the witnesses and provide their fees? In whose name is judgment to be pronounced? If the accused is convicted and ordered to be imprisoned, who is to enforce the sentence? If he is deemed worthy of executive clemency, who is to exercise it—the Governor of the State or the President of the United States? Can the Governor release from the judgment of a Federal Court? These and other questions which might be asked show as justly observed by the counsel of Virginia, the incongruity and obscurity of the attempted proceedings."

The necessity of Congress having to enact some mode of procedure in such a case after its removal before the proceeding could be tried seems not to have been admitted, as Justice Clifford thought. Concerning the matter, Jusice Strong, who delivered the opinion in the case of Tennessee vs. Davis, 100 U. S., 257, holding Section 643 to be constitutional, said:

"The imaginary difficulties and incongruities supposed to be in the way of trying in the Circuit Court an indictment for an alleged offense against the peace and dignity of a State, if they were real, would be for the consideration of Congress. But they were unreal. While it is true there is neither in Section 643 nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed except that it is ordered, the cause when removed shall proceed as a cause originally commenced in the Court. Yet the mode of trial is sufficiently obvious. The Circuit Courts of the United States have all the appliances which are needed for the trial of any criminal cases. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them Courts within the States to administer the laws of the States in certain cases; and so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State in tribunals of the General Government grows entirely out of the division of powers between that Government and the Government of a State; that is, divisions of soverignty over certain matters. When this is understood, and it is time that it should be, it will not appear strange that even in cases of criminal prosecution for alleged offenses against a State, in which arises a defense under United States law, the General Government should take cognizance of the case and try it in its own Courts according to its own form of proceeding."

The warrant found by the majority of the Court in the Federal Constitution for Section 643 was the second section of Artice 3 and the eighth section of Article 1 thereof. By the former it is provided that the judicial power of the Federal Government shall extend to all cases in law and equity arising under the Constituton and laws of the United States and treaties made under their authority. By the latter it is provided that Congress shall have power to make all laws necessary and proper for carrying into execution all the powers vested by the Constitution in the Government of the United States or in any department or officer thereof. It was held that a State prosecution for a State offense, pending in a State Court in which the defendant claims that the act for which he is being prosecuted was done under the color of his office as a Federal official, was a case arising under the Constitution and laws of the United States to which the judicial power thereof extended, and that a law providing for the removal of such prosecution to the Federal Court was proper for carrying into execution such power.

The warrant so found for Sections 641 and 642 and Section 18 of the Act of March 1, 1875, was the Fourteenth Amendment to the Federal Constitution, and particularly that part thereof contained in the last clause of the first section thereof, providing that no State shall "deny to any person within its jurisdiction the equal protection of the law," and in the fifth section thereof, providing that

> "The Congress shall have power to enforce by appropriate legislation the provisions of this article."

Said last clause of the first section, though in form a prohibition simply against State action amounting to

a denial to any person within its jurisdiction of the equal protection of its laws, conferred a right on such person to the equal protection of the laws which he was entitled to enforce.

In the case of Yick Wo. vs. Hopkins, 118 U. S., 356, Justice Matthews said that it was "a pledge of the equal protection of the laws."

And in the case of Strauder vs. West Virginia, *supra*, Justice Strong said:

> "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity for right."

THE NATURE OF PROTECTION AFFORDED.

As to th protection it afforded, Justice Field has this to say in the case of Santa Clara vs. So. Pacific R. R. Co., 18 Fed., 398:

> "This protection attends everyone everywhere, whatever be his position in society or his association with others, either for profit, improvement or pleasure. It does not leave him because of any social or official position which he may hold, or because he may belong to a political body or a religious society, or be a member of a commercial, manufacturing or transportation company. It is the shield which the arm of our blessed Government holds at all times over every man, woman and child in all the broad domain, wherever they may go and in whatever relation they may be placed."

Said sections 641 and 642 enforce said last clause of the first section in that they provide that if in a civil or criminal prosecution pending in a State Court the defendant therein is (1) denied or (2)can not enforce therein

any right secured to him by *any law* providing for the equal civil rights of citizens of the United States or of all persons within the jurisdiction thereof, (by which primarily, if not exclusively, is meant said clause,) he shall be entitled to have the suit or prosecution removed to the Federal Court. Said section 18 of the Act of March 1, 1875, enforces said clause in that it provides for the endictment and conviction in a Federal Court of any State official charged with the duty of selecting or summoning jurors who discriminates against him because of his color and who to this extent denies him the right to the equal protection of the laws pledged by said clause.

The defendant has the right which he asserts in the second paragraph of his petition, to-wit, to have the jurors from which the jury is to be empaneled to try him, selected from the persons possessing the statutory qualifications, without discrimination against those of them who are members of the same political class as defendant, because of belonging to such class. And this is a right secured to him by the equal protection of the law clause of the Fourteenth Amendment.

A State has a right to discriminate between persons within its jurisdiction, but must refrain from unjust or unreasonable discrimination. The discrimination must be along just and reasonable lines. A discrimination that is without a just and reasonable basis is purely arbitrary. And, as said by Justice Matthews in Yick vs. Hopkins, *supra*, the principles upon which the institutions of our Government are supposed to rest, "leave no room for the play and action of purely personal and arbitrary power."

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and ad-

ministered by public authority with an evil eye and an unequal hand, so as practicaly to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

"The fact of this discrimination is admitted. No reason for it is shown, and the conclusion can not be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourtenth amendment of the Constitution."

Yick Wo. vs. Hopkins, 118 U. S., 356. Opinion of Justice Mathews.

"The question in each case is whether the Legislature has adopted the statute in exercises of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

Holden vs. Hardy, 169 U. S., 366. Opinion by Justice Brown.

"But in our country hostile and discriminating legislation by a State against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the Fourteenth amendment."

Ho Ah Kow vs. Nunan, Fed. Cas. No. 6546.

"In the administration of criminal justice, no rule can be applied to one class which is not applicable to all other classes."

Gibson vs. Miss., 162 U. S., 565.

SELECTION OF JURORS.

A discrimination by the State between persons within its jurisdiction is just and reasonable in the selection of jurors.

"We do not say that within the limits from which it is not excluded by the amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history it had no such purpose."

Strauder vs. West Va., 100 U. S., 303.

Beyond such discrimination, *a class discrimination* in the selection of jurors is unjust and unreasonable.

"If in those States where the colored people constitute a majority of the entire population, a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment."

Strauder vs. W. Va., *Supra.*

Judge Barker, in his separate opinion rendered on the last hearing of this prosecution in the Court of Appeals (38 S. W., 149) sums up the position of the Supreme Court of the United States, in this particular, in these words:

> "The Supreme Court of the United States, the final arbiter in all matters involving the Federal Constitution, has uniformly held that the exclusion from juries, grand or petit, of persons belonging to a class for the sole reason that they belonged to such class, is, as to a member of the excluded class being tried under a charge of crime, a deprivation of the equal protection of the laws. This question has generally arisen in cases involving the exclusion and trial of negroes. This might well be expected in the confusion of adjusting the rights of this race from their former condition of slavery to that of citizens under the Thirteenth, Fourteenth and Fifteenth Amendments. But the application of the principle under discussion is not confined to the rights of negroes. It extends to every person whatever his race, color or political affiliation—if his legal rights have been denied solely because thereof."

The right of the accused in this case is not a right to a mixed jury.

> "Nor did the refusal of the Court and the counsel for the prosecution to allow a modification of the venire, by which one-third of the jury or a portion of it should be composed of persons of the petitioner's own race, amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States. The privilege for which they moved and which they also asked from the prosecution, was not a right given or

secured to them or to any person by the law of the State or by any act of Congress, or by the Fourteenth Amendment of the Constitution. It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioner by the State Court, viz., a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia or by any Federal statute. It is not, therefore, guaranteed by the Fourteenth Amendment or within the purview of section 641."

Va. vs. Rives, 100 U. S., 313.

Just how far the fairness and impartiality of the jury will be affected by class discrimination depends on circumstances. In some circumstances it will be affected more than in others. But it is hard to conceive of a case where it will be more affected than in a case where there has been discrimination against the political class to which the defendant belongs and the case has a political bearing and has awakened great political feeling.

Jubge Barker, in the separate opinion heretofore referred to, truly aid:

"I do not insist that in ordinary circumstances there is any necessity for watchfulness to keep politics out of the jury box. When, ordinarily, one is arraigned for crime it is immaterial whether the jurors are of the same or an opposing political party. Usually there is a question which excites neither the interest of the accused nor that of his counsel. But

when the offense springs from an intense political contest, all becomes different. Then the political complexion of the jury is all important. The administration of even-handed justice has no more insidious enemy than political prejudice. It enters unseen and unsuspected into the human mind, corrodes the reason and undermines the judgment. Neither purity of heart nor exaltation of character afford an antidote for this deadly poison. Indeed these virtues may well magnify the evil, for the mind thus possessed is all the more ready to enforce the oblique judgment when it has no cause to suspect its own integrity."

And again:

"Nothing more surely tends to enhance the respect men owe to the law than a fairly rooted conviction that its judgments are the offspring of even-handed justice, and, of its temple, an impartial jury is the chief corner stone. On the other hand, nothing is so certainly productive of distrust and fear out of which springs anarchy as a well-grounded suspicion that judicial procedure is tainted with partiality and indirection. That conviction forms the basis for the love of the citizen of his State in return for the 'equal protection of the laws,' and this suspicion engenders the scorn and hatred which all good entertain for that Oriental system of judicature with whose decree the chance of the dice box is honest by comparison; and of this suspicion a partisan jury is the most effective promoter."

FACTS ALLEGED AND ADMITTED.

A statement of the facts alleged in the petition, and admitted by reason of the fact that the petition was in no

way contradicted or traversed, must be included in this brief. The consideration of these facts can only be complete when taken in connection with two matters described by Judge Cochran in his opinion as follows:

> "It will aid in presenting them to make a preliminary statement in regard to two matters. One relates to the method of selecting jurors prescribed by the statutes of Kentucky. A certain number of jurors are selected annually by three Jury Commissioners appointed annually for each county by the judge of the Circuit Court. In Scott county the Jury Commissioners seem to be appointed each year at the regular October term of the Circuit Court thereof. The names of the jurors thus selected are placed by the commissioners in a wheel, and the regular grand and petit jurors for each term thereafter during the year are drawn from the wheel. The commissioners draw the panels for the first term thereafter, and the Circuit Judge draws them for the subsequent terms. The statute provides that the commissioners shall be intelligent and discreet housekeepers of the county, over twenty-one years of age, resident in different portions of the county, and having no action in Court requiring the intervention of a jury. They are required to select the jurors from the intelligent, sober, discreet and impartial citizens, resident housekeepers in different portions of the county, over twenty-one years of age. It is provided that the judge of the Circuit Court may at any time during the term when it is necessary, when the regular panel is for any reason exhausted, draw and select from the wheel other persons to act as grand and petit jurors, or he may in his discretion direct that such jurors be supplied from bystanders.

The other matter referred to is the number of peremptory challenges allowed in the State Courts in a felony prosecution. They are five to the Commonwealth and fifteen to the defendant."

Now as to the facts that appear in relation to a denial of defendant's said constitutional right. And first what facts are alleged in the second paragraph of the petition.

Four circumstances are alleged that show that in the selection of the jurors from which the jury that tried defendant on each occasion came those persons qualified for jury service who belonged to the same political class as defendant, to-wit, Republicans, were purposely excluded therefrom, and thus discriminated against.

The first is the existence of a state of feeling against the defendant on the part of those of opposite politics because of his alleged offense. It is alleged that at the regular election for Governor and other State officials, in November, 1899, said William Goebel was the Democratic candidate for Governor; said William S. Taylor was the Republican candidate therefor, and defendant was the Republican candidate for the office of Secretary of State, that said Taylor, defendant and the other Republican candidates were declared elected and inducted into their respective offices; that thereafter Goebel contested Taylor's right to th office of Governor; defendant's opponent contested for the office of Secretary of State, and like contests were had as to the other offices—that it was pending said contest that Goebel was assassinated—that the public mind was greatly inflamed and bitter, and intense political animosities were excited and fostered by reason of said election, contest and assassination—and that such feelings existed at each of said three trials, and still existed aganist him on the part of Goebel Democrats

throughout the State, and particularly in Scott county. At the election in 1889 there was a split among the Democrats. John Young Brown ran as an independent, and by Goebel Democrats is meant those that supported Goebel.

The second is that those who had to do with selecting the jurors from whom the three juries came were all Goebel Democrats.

The third is that at the time of each of the trials there were in Scott and Bourbon counties such a number of Republicans that it is not likely that a jury would have been obtained having no Republicans upon it. It is alleged that at the presidential election in November, 1900, 2,500 Democratic and 2,100 Republican votes were cast in Scott county—that in the presidential election in 1896, 2,600 McKinley and 2,200 Bryan votes were cast in Bourbon county—and that at the State election in 1899, Taylor received twenty-seven more votes than Goebel in Bourbon county.

DEMOCRATIC AND REPUBLICAN VOTE.

It appears from the returns that at the last three presidential elections, in said two counties, the vote was as follows:

SCOTT COUNTY.

	Dem. Votes.	Rep. Votes.
1896	2,374	1,713
1900	2,539	2,107
1904	2,237	2,111

The average Democratic vote for the three elections was 2,378 and the average Republican vote for same was 1,977. For the last two years the former average was 2,388 and the latter 2,109.

Bourbon County.

	Dem. Votes.	Rep. Votes.
1896	3,210	2,578
1900	2,411	2,217
1904	2,586	2,147

The average Democratic vote for the three elections was 2,042 and the average Republican vote for the same was 2,314. For the last two years the former average was 2,498 and the latter 2,182. It is further alleged that the number of white Republican voters in Scott county is about 1,300, and that in Bourbon county three-fifths of the Republican voters are negroes, which would make the white Republican voters in Bourbon county about 900. The proportion of Democratic voters to Republican white voters of Scott county is not as great as two to one. In Bourbon county it is somewhat less than two to one, and not as great as three to one. If then, no more in proportion of Democratic voters were disqualified or excused from jury service than Republican white voters—which it is reasonable to conclude is the case—it follows that the proportion of Democratic qualified and non-excusable jurors to Republican white qualified and non-excusable jurors in Scott county was not as great as two to one, and in Bourbon county it was between three to one and two to one.

The fourth and last circumstance referred to is, that upon neither one of the three juries that tried defendant, was there a single Republican. As to the composition of the first jury, it is alleged that it was composed "almost, if not entirely, of Goebel Democrats, and no Republicans;" as to the second jury, that it was composed "entirely of Goebel Democrats"; and as to the third that it was compesed "entirely of Goebel Democrats—one juror, a Goebel supporter, but of doubtful politics, excepted."

ALLEGED DISCRIMINATION.

Then certain acts are alleged in relation to the selection of the jurors from which said juries were impaneled, and to the impaneling of the juries therefrom, which, taken in connection with said circumstances, establish, if true, that in such selection Republicans were discriminated against and purposely excluded therefrom, in order that there might not be any of them on the jury to try defendant, and that *the Scott Circuit Court held that such discrimination was not illegal, and that the defendant had no right to have it refrained from.* The Scott County Circuit Court held such purpose exclusion no denial.

REPUBLICANS PURPOSELY EXCLUDED.

It is alleged as to the first trial at the July-August, 1900, special term, that there were in the wheel the names of 100 undrawn jurors, placed there prior to the election of 1899 and the assassination of Goebel by impartial and unbiased jury commissioners appointed by the Circuit Judge in October, 1899; that upon the regular panel being exhausted, defendant moved said judge to select additional jurors required from the wheel, and that he refused to do so, and directed the sheriff of Scott county to summon first 100 men and then 40 men for jury service from said county, and to summon no man from Georgetown, the county seat of said county, but to go out in the county for that purpose; that the men so summoned were, with the exception of three or four Republicans and independent Democrats, known to be partisan Democrats, and were, with said exception purposely summoned because of their known party affiliation; that when the men so summoned appeared in Court they were seated on the side of the court room separate and apart from the spectators and other persons, *and said judge, without notice to the defendant or his counsel, or making any request of*

either of them, left the bench, went to the place where said veniremen were seated, called them up to him one at a time, not in defendant's or his counsel's hearing, and without swearing them, excused such of them as he saw fit from jury service; and that from the jurors so summoned, the first jury was obtained.

As to the second trial at the regular October term, 1900, it is alleged that at the October term, 1900, when an appeal was pending from the judgment entered upon the verdict of the first jury, and there was a possibility of its being reversed and another trial had, said judge appointed as jury commissioners John Bradford, Ben Mallory and H. H. Haggard, all Goebel Democrats; that said jury commissioners placed in the wheel the names of 200 citizens of Scott county, 195 of whom were Goebel Democrats, and five of whom were Republicans; that of the names so placed in the wheel, seventy-five were drawn at the regular February and May, 1900, terms of said Court, and 125 were drawn at the regular October, 1901, term, upon defendant's second trial; that of the five Republicans so placed in the wheel at the beginning, one was drawn at the February term, one at the May term, and the other there at the October term; that of the three drawn at the October term, two were disqualified by previously-formed opinions, and the other was peremptorily challenged by the Commonwealth; that the jury was not obtained from said Scott county jurors, probably as much as six jurors being obtained therefrom, and the sheriff was directed to summon veniremen from Bourbon county; that he summoned 168 veniremen from said county, all of whom were Goebel Democrats except three, who were Republicans; and that from the jurors so summoned, the remaining jurors of the second jury were obtained.

As to the third jury at the last trial at the special term in August, 1903, it is alleged that 176 jurors were summoned from Bourbon county and of them three, or possibly four, were Republicans, and the remaining 172 or 173 were Goebel Democrats, and were summoned because they differed politically from defendant.

It is further alleged that on each of said trials Republicans and independent Democrats qualified for jury service were intentionally passed by in selecting and summoning veniremen, in order that defendant might not have a fair trial by a jury of his peers impartially selected, but to the end that a jury might be selected to convict him; that in the second trial he objected to the formaion of a jury from he veniremen summoned, and moved the Court to discharge the entire venire on the ground that he could not obtain a fair trial before a jury selected therefrom, and filed an affidavit in support thereof; but although the statements in said affidavit were true, *and known to be true by the Court*, he was forced to submit to trial before a jury composed as heretofore stated; that on the third and last trial he asked the Court to admonish the sheriff to summon an equal number of men of each political party; which request was refused; that he then asked the Court to instruct him to summon the talesmen as he came to them, regardless of political affiliation, *which request was also refused;* and that at each of said trials the facts in relation to the jurors, as heretofore stated, were embraced in affidavits filed in support of challenges to the panel and the venire and objections to the formation of the jury from the men so summoned, and also in the motions, and grounds for new trial, prepared and filed on behalf of defendant at each of the trials; *but they were disregarded by the Court*, and defendant's challenges to the panels and to the venire and motions for new trial in each instance were overruled.

ALLEGATIONS ACCEPTED AS TRUE.

The Commonwealth of Kentucky has not filed a reply to said petition for removal, or in any way taken issue with the defendant as to any of the allegations thereof. Said allegations must, therefore, be accepted as true save in so far as they may be contradicted by the transcript on file herein.

In the case of Dishon vs. C. N. O. and T. P. Ry. Co., 133 Fed. 471, Judge Richards, in discussing the affirmative allegations of a petition for removal in a civil suit under the jurisdictional acts of 1887-1888, said:

> "If these averments were not true, the plaintiff should have denied them and an issue would then have been made for the Court below to try and determine. No answer was filed, no issue in any other way was taken. The plaintiff contented himself with making a motion to remand, and which only raised a legal question, namely, whether, upon the facts stated in the petition for removal, taken in connection with the record, a case for removal was made out."

In the case of Whitton vs. Tomlinson, 160 U. S., 231, Justice Gray, in referring to a petition for a writ of *habeas corpus* under Section 751-755 U. S. Rev. Stat., said:

> "In a petition for a writ of *habeas corpus*, verified by oath of the petitioners, as required by the U. S. Rev. Stat., Sec. 754, facts duly alleged may be taken to be true, unless denied by the return or controlled by other evidence. But no allegation of fact in the petition can be assumed to be admitted, unless distinct and unambiguous."

The allegations of the petition for removal ore not borne out by the transcript in all their detail. They are,

however, borne out to a substantial degree and are not contradicted in any substantial particular. It establishes the discrimination complained of in the selection of the jurors by the subordinate officers having to do therewith on the second and third trial, and that on both trials the Scott Circuit Court held that such discrimination was not illegal, and the defendant had no right to complain thereof, it not being claimed that the jurors selected did not possess the statutory qualifications.

THE "INABILITY TO ENFORCE" CLAUSE.

It is contended upon the part of Caleb Powers in this case, and in his petition for removal, that he can not enforce his right to the equal protection of the laws in the judicial tribunals of the State of Kentucky; and because of this he is entitled to a removal. By an inability to enforce in the judicial tribunals of the State is meant any judicial tribunals of the State that may have jurisdiction of the prosecution. It was intended thereby to provide that if a defendant in a criminal prosecution pending in a State tribunal, can not enforce his right to the equal protection of the law in such Court, *or in any Court to which it may be carried,* then he is entitled to removal. In this case the Court of Appeals of Kentucky has jurisdiction of the prosecution against Powers. It can be carried there on appeal from the Circuit Court. But defendant *can not enforce therein* his right to equal protection of the laws, if denied in the Circuit Court at a future trial, and this is by virtue of legislative action embodied in Section 281 of the Criminal Code of Kentucky. It is accordingly well said by Judge Cochran:

> "The conclusion I have reached, therefore, is that this case comes within both halves of the statute."

REFUSAL TO PASS UPON DISCRIMINATION BY THE COURT OF APPEALS OF KENTUCKY.

By Section 281 of the Criminal Code of Kentucky, it is provided as follows:

> "The decisions of the Court (trial Court) upon challenges to the panel (a), and for cause (b), upon motion to set aside an indictment (c), and upon motion for a new trial (d), shall not be subject to exception."

Because of this Code provision, the Court of Appeals refused, on the second and third hearing therein, to pass upon the action of the Scott Circuit Court on the second and third trials therein in relation to the defendant's challenges to the venires and panels. It held that jurisdiction had not been conferred upon it to hear and pass upon such questions, and hence declined to express any opinion in regard thereto.

On the second hearing in the Court of Appeals, Judge O'Rear, who delivered the opinion on behalf of the majority, said:

> "Objections were made by affidavit and motion to the manner of selecting the jury in this case, and to the venire because of its bias. The charges made are of a most serious import, if true. But it is proper to state that they are controverted, except as to the fact of the political affiliation of the panel summoned in the case. It should not be said, and it can not be true, that *per se* a Democrat is disqualified from fairly trying a Republican charged with crime, or *vice versa*. If men should be selected as jurymen whose prejudices would be relied on to procure a conviction or acquittal of one whom they are trying, charged with crime, we are fully persuaded that the

fact of the politics of such jurymen would not be the cause of such selection. It would be the character of those so selected. But it has been held (Terril vs. Com., 13 Bush, 246; Kennedy vs. Com., 14 Bush, 342; Foreman vs. Com., 86 Ky., 606, 9 R., 759, C. S. W., 579) that objection to the panel of the jury shall not be subject to review by this Court. It is the opinion of the Court (a point upon which, however, we have not been in entire accord) that under paragraph 281, Cr. Code Prac., *this Court has no jurisdiction to pass upon these questions.* In the opinion of some of the members, when jurisdiction is conferred upon this Court of this class of cases, it is not competent for the Legislature to limit the Court as to what errors it may reverse for, or as to what shall not be the subject of reversal; that to so allow is to leave the propriety and legality of the proceedings in the Court to legislative, and not judicial, control. *The majority of the Court adheres to the former rulings on this subject.* The manner of selecting the jury, except as regulated by statute, is within the control of the trial Court. To its sense of fairness and desire to dispense that justice in trials whose essence is impartiality, *this question must be left.*"

On the third hearing, though the Court of Appeals reversed the judgment of the lower court, it refused to do so on the ground that it had erred in its action as to the challenges. Judge Barker delivered the opinion of the majority of the Court setting forth the grounds upon which the reversal was had, as heretofore set forth. He also filed a separate opinion, in which two other of the judges concurred, and in which he took the ground that the judgment should be reversed upon the error of the lower court as to the challenges. He said:

"Having written the opinion of the Court in this case on the only theory upon which a majority of the members could agree, the deep conviction I have on the Federal question contained in the record constrains me to express in a separate opinion my personal views on that subject."

And after doing this he said:

"In conclusion, I am of the opinion that the trial judge should have passed upon the question of fact presented by the appellant as to the summoning of the jurors, and if there was even a well-grounded suspicion that unfairness had prevailed, the jury should have been discharged and others summoned under such safeguards as would preclude indulgence in partisan methods."

He took the position that the Court of Appeals had jurisdiction to pass on said question by virtue of Article 6 of the Federal Constitution, which provides that:

"This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; *and the judges in every State shall be bound thereby,* anything in the Constitution or laws of any State to the contrary notwithstanding."

It is not expressly stated in the opinion delivered on the last hearing, that the Court refused to pass on this Federal question because of said Section 281, but there can be no doubt that such was its reason in not doing so.

POWERS' RIGHTS EXIST EVEN UNDER STRICT CONSTRUCTION.

In holding that discriminations set out in the petition for removal, and not traversed by the Commonwealth, and therefore substantially admitted to be true, constituted a denial of the equal civil right of the petitioner, and that the Court of Appeals of Kentucky, which is the court of last resort, had refused to pass upon this discrimination, although there had been a denial of equal civil rights, Judge Cochran, in his decision in this case in the court below (the United States Circuit Court) did not act upon the theory that Section 641 should be liberally construed. Upon this point he said:

> "A word or two as to whether the section should be liberally or strictly construed. It is well settled that the Fourteenth Amendment should be liberally construed. In the case of Strauder vs. West Virginia, *supra,* Mr. Justice Strong said:
>
> 'If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally to carry out the purposes of its framers.'
>
> As Section 641 was enacted to enforce said amendment, there would seem to be some ground for holding that it, too, should be construed liberally. Another consideration that may be thought to lead in the same direction is this: The object of the jurisdictional acts of 1887-1888, as is well known, was to restrict Federal jurisdiction in civil suits. This it did by enlarging the amount in controversy essential to jurisdiction, and cutting down the time within which a petition for removal might be filed, and perhaps in other ways. But by Section 5 thereof, Sec-

tions 641, 642 and 643 were continued in force without a change in any of their provisions. On the other hand, attention may be directed to the fact that the jurisdiction conferred by Section 641 is a delicate one, and in its exercise calculatedl to disturb the harmony that should exist between Federal and state jursdictions. This thing of taking a state prosecution for a state offense, pending in a State Court, out of said court bodily and transferring it to a Federal Court under circumsances that can not help be construed as a reflection upon the State Court and the State itself, is a very serious matter, and in view of it I am inclined to believe that the section should be strictly construed. Judge Rives characterized the Federal jurisdiction thus acquired as 'an anomalous jurisdiction,' and in the case of Fowkes vs. Fowkes, Fed. Cas., 5,005, he thus expressed himself as to how Section 641 should be construed:

'It is observable that the late comprehensive act of March 3, 1875, embraces cases only originally cognizable by the Federal courts. The same is the case of removal on the ground of prejudice or local influence. The exception to this applies to cases of public officer; and to persons denied or prevented from enforcing in the courts of the state their equal civil rights. This departure from the fundamental principal of limiting removals to cases cognizable in the Federal courts, results from the duty of the Government to its officers and the obligations of Congress to enforce, by appropriate legislation, the provisions of the Fourteenth Amendment. *These exceptional statutes, therefore, are to be strictly construed, interpreted, if practicable,* in subordination to and in conformity with the theory of our judicial sys-

tem, state and Federal, and the provisions of the Constitution.'

But, however, this may be, the statute is not to be frittered away by construction, because of the delicacy of the jurisdiction it confers. In referring to Section 643 in Tennessee vs. David, *Supra*, Mr. Justice Strong said:

'That the act of Congress does provide for the removal of criminal prosecutions for offenses against the state laws where there arises in them the claim of the Federal right or authority, is too plain to admit of denial. Such is its positive language, and it is not to be argued away by presenting the supposed incongruity of administering State criminal laws by other courts than those established by the State.'

All certainly that can be required is that it should be made clear and reasonably certain that the case in question comes within the meaning of the statute.''

A BRAND NEW CASE BECAUSE INVOLVING A DISCRIMINATION BY THE COURTS.

It is well settled that a class discrimination in the selection of jurors, grand or petit, by subordinate officers charged with their selection, nothing else appearing, is not a denial in the judicial tribunals of the State of the equal protection of the laws, within the meaning of Section 641; and on the other hand, equally well settled that where there is a statute providing for such discrimination, though not constitutional, and null and void, there is such denial.

But this is the full extent to which the applicability of Section 641 has been determined by the courts.

It is held that an illegal discrimination by subordinate officers is not within the statute, and that such a discrimination by the Legislature is.

It follows further, that in so far as said discrimination in the case at bar was on the part of the Scott Circuit Court, the second paragraph of the petition in this case states a case that is beyond any case that has yet arisen under Section 641; and hence a case that is as yet undetermined by the courts.

The only case in which judicial action prior to the filing of the petition for removal was made a ground for the right to remove, was in the case of Virginia vs. Rives, and it was held therein that said judicial action, so relied on, was not a denial of the equal protection of the laws. It was simply a refusal to provide a mixed jury, to which defendants were not entitled under the Fourteenth Amendment. Upon this point Judge Cochran in his opinion says:

"A Brand New Case."

"There is no escape, therefore, from the conclusion that we have here a brand new case—a case beyond any that has been heretofore decided or had in contemplation. Does it then come within the true intent and meaning of Section 641? Though it is beyond the cases heretofore decided, we can obtain help from them in answering this puestion. The result of those cases we have found to be is, that an alleged discrimination of the kind complained of by the subordinate officers who select the jurors when there is nothing in the statute requiring it, is not within Section 641. On the other hand, such an illegal discrimination made by statute is within said section. Now it would seem that if we can get a

firm grasp of the idea why the one discrimination is held not to be a denial in the judicial tribunals of the State, and the other discrimination is so held to be such a denial, we will have obtained some help to the solution of said question. The reason why a discrimination by subordinate officers is held not to be a denial is, as stated by Justice Strong, in a quotation already made from his opinion in Virginia vs. Rives, this:

'It ought to be presumed the Court will redress the wrong.'

"Or again:"

'The Court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior Court.'

"The reason why a discrimination by legislative action is held to be a denial is, as likewise stated, this:

'When a statute of the State denies his right or interposes a bar to his enforcing it in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions.'

"The one discrimination is not a denial, therefore, because it will not affect the judicial tribunals of the State prejudicially to the defendant. The other discrimination is a denial, because it will so affect said tribunals. It will not affect them absolutely or certainly. It may not affect them at all. Indeed, it is their duty not to be affected by it. Article 6, of the Federal Constitution, requires that they should not be affected by it. But they may be, and the presumption is to be indulged that they will be, notwithstanding that in a ***habeas corpus*** case under Sections

751-755, on account of one claiming to be in custody in violation of the Constitution, the contrary presumption is indulged in.

"Does it not follow from this that any other State action involving an illegal discrimination which will in a real sense affect the judicial tribunals of the State—in as real a sense as legislative action will—is within the meaning of Section 641? I think it is."

* * * * * * * * * * *

"The position that what amounts to a denial of the equal protection of the laws by judicial action prior to the filing of the petition for removal may be within Section 641, is strengthened by two considerations. One is that the denial called for by said section is not limited in its words to a denial by legislative action. There is not a word said about legislative action in this section. The other is that the section authorizes a petition for removal to be filed after judicial action has been had, not only outside of the prosecution, but within it. The time fixed for filing it is 'at any time before the trial or final hearing of the cause.'"

In the case of Ayers vs. Watson, 113 U. S., 594, Justice Bradley said:

'This language has been held to apply to the last and final hearing.'

To the same effect see Home Life Ins. Co. vs. Dunn, 86 U. S., 214; Vanneyer vs. Bryant, 86 U. S., 4; Jifkins vs. Sweester, 102 U. S., 177; B. & O. R. Co. vs. Bates, 119 U. S., 464; Fisk vs. Henarie, 142 U. S., 459; City of Detroit vs. Detroit City Ry. Co., 54 Fed., 10.

In Bush vs. Kentucky, *supra*, the case was removed from the State Court on the first application,

after a reversal by the Court of Appeals of a judgment in the trial court. And in Davis vs. So. Carolina, 107 U. S., a removal was had under Section 643, which has same language as 641 as to the time after a trial and verdict, and a new trial granted."

STATUTE CONTEMPLATED REMOVAL AFTER JUDICIAL ACTION.

"The statute, therefore, contemplated a removal after several trials and the case had gone to the Court of Appeals several times, as here, and therefore, after judicial action had in the prosecution that might affect the last and final trial."

It is contended upon the part of Caleb Powers in this case, and in his petition for removal, that he can not enforce his right to the equal protection of the laws in the judicial tribunals of the State of Kentucky; and because of this he is entitled to a removal. By an inability to enforce in the judicial tribunals of the state is meant any judicial tribunals of the state that may have jurisdiction of the prosecution. It was intended thereby to provide that if a defendant in a criminal prosecution pending in a state tribunal, can not enforce his right to the equal protection of the law in such court, or in any court to which it may be carried, then he is entitled to removal. In this case the Court of Appeals of Kentucky has jurisdiction of the prosecution against Powers. It can be carried there on appeal from the Circuit Court. But defendant can not enforce therein his right to equal protection of the laws, if denied in the Circuit Court at a future trial, and this is by virtue of legislative action embodied in Section 281 of the Criminal Code of Kentucky. It is accordingly well said by Judge Cochran:

"The conclusion I have reached, therefore, is that this case comes within both halves of the statute."

The writer of this brief has endeavored to prepare a synopsis of the decision of Judge Cochran, in order to show how compelete and painstaking and methodical it was, and in order that by reference to this synopsis, imperfect as it is, this Court may readily turn to any given portion of the opinion. The numerals and subdivisions are entirely the work of the writer of this brief, and if any inaccuracies are found, the opinion itself is not to be considered at fault. The main topics treated of are indicated by Roman numerals, and the subdivisions or particular paragraphs by other figures and letters.

I. The statute allowing a removal for a denial of (or inability to enforce) equal civil rights guaranteed by the Fourteenth Amendment. (Printed record, p. 242.)

II. Origin and history of the statute. (Printed record, p. 243.)

III. Its constitutionality. (Printed record, p. 244.)

IV: The proceedings in this cause in the State Courts. (Printed record, p. 247.)

V. The proceedings in the Federal Courts—the filing of petition for removal, and motion for writ of *habeas corpus cum causa*. (Printed record, p. 249.)

VI. The question raised by the motion for writ of *habeas corpus cum causa*, viz: did petitioner's various steps work a transfer of jurisdiction? (Printed record, p. 250.)

VII. Statement of the three things essential to that effect, viz:

A. A right of petitioner which he is entitled to enforce.

B. A right secured to him by law providing for the equal civil rights of citizens of the United States.

C. A "denial" (a) of, or "inability" (b) to enforce, that right in the State Courts. (Printed record, p. 250.)

VIII. The first paragraph of petition—the pardon paragraph—temporarily passed without decision. (Printed record, p. 250.)

IX. The right stated in the second paragraph—the jury paragraph—right to have the state refrain from unjust or unreasonable discrimination against the class of persons to which the petitioner belongs. (Printed record, p. 250.)

A. Discussion of question whether petitioner has the right (concluding that he has. (Printed record, p. 251-3.)

B. Discussion as to whether such right is guaranteed by Fourteenth Amendment (concluding that it is.) (Printed record, p. 251-3.)

(a). This right is a right to have a jury selected without discrimination against class of citizens to which petitioner belongs. (Printed record, p. 253.)

(b). This right is not a right to a mixed jury. (Printed record, p. 253.)

(c). This right, being a constitutional right, should be respected by every one. (Printed record, p. 253.)

(d). This right, though narrower than the conception of a fair and impartial jury, is an essential element in such a jury, especially in a case characterized by intense political excitement. (Printed record, p. 253.)

X. Discusson of question whether petitioner has been "denied" the right (the question of "inability to enforce" being temporarily passed without decision until the other half of the statute is considered), dividing the question into two parts, viz: First, What are the "facts," and second, what the legal "construction". (Printed record, p. 255-264. See p. 265 for the "legal construction matter.")

XI. Inquiry as to what are the "facts," including a "preliminary statement," as to two matters, viz: (1) a statement describing method of selecting jurors. (2) Statement that only five peremptory challenges are allowed in Kentucky in a criminal prosecution in a State Court (and concluding that four circumstances show that Republicans were purposely excluded from the persons selected as jurors). (Printed record, p. 255.)

(a) First circumstance: Existence of a state of feeling against the petitioner by citizens of opposite politics. (Printed record, p. 255.)

(b) Second circumstance: Those who had to do with selecting jurors were all Goebel Democrats. (Printed record, p. 256.)

(c) Third circumstance: There were in Scott and Bourbon counties such numbers of

Republicans that it is not likely that a jury would have been obtained having no Republicans in it. (Printed record, p. 257.)

(d) Fourth circumstance: Upon neither one of the three juries was there a single Republican. (Printed record, p. 258.)

(e) Additional circumstances, concerning action of Scott Circuit Court overruling motions, challenges and objections to such formation of juries. (Printed record, p. 258-262.)

(f) Inquiry whether, in absence of specific denial or traverse, the allegations in petition as to all these circumstances are to be taken as true (concluding that they are, so far as not contradicted by the transcript of record on file). (Printed record, p. 259.)

(g) Conclusion that there was a "denial" the Scott Circuit Court by that Court. (Printed record, p. 263.)

"He (Powers) has, therefore, been denied the equal protection of the laws guaranteed him by the Fourteenth Amendment, both by said subordinate officers and by said court."

(h) Discussion of attitude of Court of Appeals, and conclusion that it did not "deny" petitioner's right, but did "refuse to pass" upon the same upon the second and third appeals, because in the opinion of said Court of Appeals it had no jurisdiction to do so. (Printed record, p. 264.)

XII. The legal construction to be placed upon the denial—was it a "denial" within the meaning of Section 641, or was it simply a denial necessitat-

ing application for writ of error, as contended by the Commonwealth (concluding it was within the statute). (Printed record, p. 265.)

(a) The section should be strictly construed, but not frittered away.(Printed record, p. 266.)

(b) The first cases considered by the Federal Courts held that strong prejudice alone did not constitute a denial within Section 641. (Printed record, p. 267.)

(c) Other cases held that mere criminal misuse of good laws by sheriffs and other jury officers did not constitute a denial "in the judicial tribunals of the state" within the section, *i. e.* a denial justifying removal in the absence of some action making the misuse the action of the state. (Printed record, p. 269-271.)

(d) The full extent to which applicability of Sction 641 has been determined by the courts is that an illegal discrimination by subordinate officers is not within the statute, and that such a discrimination by the Legislature is. (Printed record, p. 273.)

(e) In so far as the discrimination in the case at bar was on the part of the Scott Circuit Court, the second paragraph of the petition states a "brand new case"—a case beyond any case that has yet arisen under Section 641. (Printed record, p. 276.)

(f) The only case (Rives vs. Virginia) in which specific judicial action was held not to be within the statute, held such action to be without the statute, not because it *was* judicial ac-

tion, but because it *did not* deny a *right, but* only denied a "mixed jury." (Printed record, p. 273.)

(g) Denial by judicial action is contemplated by the statute.

(h) The judicial action in the Scott Circuit Court is within the statute.

XIII. Discussion of question whether petitioner is "unable to enforce his right in the judicial tribunal of his state (concluding that he is), and so his case comes within "the other half" of the statute.

XIV. Discussion of the question of Powers' remedy (concluding writ of error probably would not lie from decison of Kentucky Court of Appeals, and that either removal or the still more delicate remedy of *habeas corpus* alone remain).

JUDGE COCHRAN'S OPINION.

The Court is earnestly appealed to, to give most careful reading and consideration to this opinion of Circuit Judge Cochran. It was not hurriedly arrived at or promulgated. The petition for removal was filed in his Court May 8th, 1905. He postponed all argument upon the subject to June 8, 1905. And although ordering this cause docketed (as required by Section 642 of the United States Revised Statutes), he refused at that time to order the petitioner brought into court by a writ of *habeas corpus, cum causa.* He had the undoubted right to do this on both May 8 and June 8. But he did not do so. He could on either of those days have assumed full jurisdiction and compelled the Commonwealth of Kentucky to interpose a motion to remand. But he did not do so.

And, although docketing the cause, he declined to either grant or deny the petitioner's motion for a writ of *habeas corpus cum causa*, but deferred the whole matter, giving absolutely no hint of his ultimate action, and convincing all present of his profound conviction of the gravity of the situation, and of his own grave responsibility in the premises. The counsel for petitioner Powers were more than anxious to secure his temporary release from confinement for even the one month intervening between May 8 and June 8, the day of argument—when it was entirely possible his application for removal might be summarily denied. The petitioner Powers' counsel felt that the imprisonment in various jails, for five (5) years and three (3) months, which the petitioner had already endured, would, if continued, undermine still further his health, which had begun to be impaired; and that, even if his application should be summarily denied on June 8, the four weeks intervening might, upon his giving proper bail, be spent in his old home in the mountains of Kentucky, in repairing his naturally superb physical health, so essential to survive the fourth trial in the exhausting heat of midsummer in Kentucky—a trial far more trying than the usual trial because he knew in advance that it would, judging from all three of the former trials, be characterized at every step by the most aggravating and provoking injustice carried on under the forms of law. This, of course, could not have been done without admitting petitioner to bail; but it seemed to petitioner's counsel that an order admitting to bail would be perfectly proper, as such practice is commended in all states, after a defendant has had three separate appeals decided in his favor. But Judge Cochran was governed by no such considerations, being determined to proceed not only decently and in order, but with extreme respect for the rights of the interests of the

Commonwealth, to the end that the very appearance of evil might be avoided, and to the end that he might hamper in no way his as yet complete freedom from opinion. After the argument of June 8, which consumed parts of two days and was very lengthy, Judge Cochran consumed thirty days more in arriving at his decision which he reduced to writing and which refers to and summarizes a large number of decisions of various state and federal tribunals. It was not until July 8 that this opinion was delivered, and the motion for the writ of *habeas corpus cum causa* granted; and even then he refused to enter an order admitting petitioner to bail, stating he did not think he should even give a hearing to such an application until the question of his right to assume jurisdiction at all should be passed upon by some higher court, if such right to review by higher court exists, or at least until a full opportunity should be had for settlement of the question by proper application to proper tribunals by the Commonwealth.

All this is in such refreshing contrast to the abrupt actions of the State Circuit Court of Scott County, Kentucky, in refusing to allow the petitioner's petition to even be filed, when it was presented there, on May 3, 1905 —and in setting the cause for trial—its fourth trial—on July 10, despite such petition (and despite the plain provision and mandatory and imperative language of the Federal statute that "upon the filing of such petition all further proceedings in the state courts shall cease, and shall not be resumed except as hereinafter provided"), that we feel we are entitled to have this Court know all this, when considering or examining Judge Cochran's opinion. (See Printed Record, pages 242-288.) The fact that, despite a proper petition, duly and properly presented in apt time, the Scott Circuit Court was calmly

proceeding to put this petitioner on trial for his life, on July 10,in absolute defiance fo the plain and perfect provisions of the Federal statutes—this fact at no time provoed or tempted Judge Corchran into hasty or resentful or even intemperate action.

A SIMPLE QUESTION.

To the writer of this brief, it seems that in this case the proposition involved is simply the question whether the United States Supreme Court—the august arbiter of the most gracious and benignant system of jurisprudence and judiciary the world has ever seen—will send this man Powers back to suffer twenty years of uncertain imprisonment (and finally to die) in a Kentucky jail—to live out a lingering torture of twenty years in Kentucky jails, and finally there to die.

There cannot be a shadow of a doubt but that, had it not been for this removal, Caleb Powers would, for the next twenty years, have been periodically encouraged and discouraged by being on the one hand tried and convicted by a packed jury in a lower court in the odd numbered years, and favored with a reversal and remand by the higher court of Kentucky in the even numbered years —until his life would have been worn out with alternate despair and hope. If this Court shall send him back now, to a Kentucky jail, it is safe to predict that ten years from now, after unspeakable anguish upon the part of this innocent victim, he will, if still alive, be before this Court, requesting it to, upon some application of his, consider and condemn, not the record of a first, second and third trial, as now, but the record of a tenth or twelfth trial. And this is the North American Republic—in the 20th Century!

There comes a time, in all the graver transactions of life, when men realize they must cast aside all subter-

fuges and self-deception and confront a given crisis face to face, sweeping away all the cobwebs and fictions, and considering and weighing not questions of policy or expediency, but the sole question of what is right, regardless of future or collateral consequences, or technical or imaginary difficulties or precedents.

Had the statesmen of old England been guided by right, instead of by hoary tradition and proud precedents coming down from times and methods of despotism, the American colonies would not have been driven in desperation to their Rebellion, and Great Britain would not have lost her most valuable colonial possessions, with their truly inestimable wealth in resources and in prospects and in men.

Had the great statesmen of a portion of the old South been able to stand upon the solid rock of human right, instead of upon fancied notions of chivalry and of invasion and of defense of a time-honored relic of barbarism, the middle of the last Century would not have witnessed a most loved and lovely country undergoing the most unprecedented and appalling sacrifice in a cause doomed in advance by Almighty God Himself, to be a lost cause.

It is not easy in any field of human endeavor, to cast aside the restraints and bonds of caution and of alleged wisdom, and of much praised conservatism (so-called), and to blaze a brand-new path, right through the debris of our carefully constructed and cherished theories and desires. Subjected to this test, the majority of men are appalled, a great multitude waver, great numbers succomb, and even many truly great men fail to be equal to the emergency. In my humble opinion, George Washington at Valley Forge was equal to the emergency; and so was Stephen A. Douglas in 1861. And, in my humble

opinion, so was Grover Cleveland in 1896. With an eye single to duty, with his heart true to his country's happiness, with head erect and soul aloft, while denunciation hurtled and thundered about him, he strode right through the debris of a great, historic, heroic, beloved party, whose honors and colors he bore, and whose unlimited generosity to him appealed to him at every step; and in the dark and threatening crisis of 1896 he saved the financial honor and integrity of his native land, and perpetuated the comfort and contentment of the common people—*the* people.

In the wide field of public service, i. e., service to the public, it is not in the department of statesmanship (involving legislative and diplomatic and executive action) alone, that men are called upon to test themselves, away from technicality and from routine, and to "do right, tho' the heaven sfall". The law is a jealous mistress: this is an old and true maxim. Devotion to her, and absolute allegiance, have required us all, many times, in our practice, to verily tear our heart out, in submission to her supposed policies, rather than try to blaze out a new path, by her benign light.

Drudgery, dreary and dull, is our portion, often and often, despite all the recurrent fascination and occasional variety. But once in a while, there comes to the practitioner that rare and radiant moment, when he realizes the true glory of his calling (and of his mistress)—when he clearly sees that while pursuing the same old forms, and without attempting even to blaze out an absolutely new path, he can cast behind him every weight and encumbrance, and like a devotee of old when his favorite goddess or oracle has indeed foretold the truth and coincided with a triumph of the Eternal Right, he, the lawyer, can say that his jealous mistress can and indeed does

remedy a great wrong and rectify a gigantic evil. Such a moment is ours, in this cause.

And the Judiciary too, in the midst of conditions and labor so monotonous as to make them all but weary unto death, may have this rare and radiant hour—when (not for man's financial benefit, but for real liberty and sublime justice), a blow may be struck by the strong arm of supreme judicial and legal power, to overthrow defiant injustice and tyranny—injustice firmly intrenched in justice halls, and hedged about with terror-inspiring forms of law:—tyrany, pointing with smug complacency, to the triumph of despotism in a free and civilized country, through the medium of refusals of succor in the citizen's only palladium, the house of the law. Such a moment is this hour, which has come to this mighty and noble tribunal of the mightiest and noblest of Republics.

Respectfully submitted,

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